

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
DIVISION OF JUDGES**

**BGC PARTNERS, INC.**

**and**

Case 28–CA–195500

**PATRICK THURMAN, an Individual**

*Nestor M. Zárate Mancilla, Esq.,*  
for the General Counsel.

*Derek G. Barella, Esq. (Winston & Strawn, LLP), and Nirav S. Shah, Esq.,*  
for the Respondent.

**DECISION**

**JEFFREY D. WEDEKIND, Administrative Law Judge.** The amended complaint in this case challenges several rules or provisions in the employee handbook maintained by BGC Partners, Inc. and its subsidiaries. The rules or provisions address various matters, including responding to requests for information, cooperating in investigations and litigation, personal appearance, and confidentiality of the handbook itself. The amended complaint alleges that BGC violated Section 8(a)(1) of the National Labor Relations Act (NLRA) by maintaining the handbook rules or provisions, and by making them available to its subsidiaries, which maintained and applied them, because the rules or provisions impede employees from engaging in various activities protected by the Act.<sup>1</sup>

BGC denies that it violated the Act. It contends that the Board does not even have jurisdiction over it because it has no employees and is not properly named as a party in this proceeding. It further contends that the challenged rules or provisions are entirely lawful because they either have no impact on activities protected by the Act or any arguable impact is negligible and substantially outweighed by the business justifications for the rules or provisions.<sup>2</sup>

The hearing was held on June 20, 2018, in Phoenix, Arizona.<sup>3</sup> The General Counsel and BGC thereafter filed briefs on July 25. For the reasons set forth below, the amended complaint is dismissed for lack of jurisdiction. There is therefore no basis or reason to reach the merits of the Section 8(a)(1) allegations.

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<sup>1</sup> The original complaint issued on August 31, 2017 (GC Exh. 1(e)), and was amended on March 6, 2018 (GC Exh. 1(j)), and again at the June 20 hearing (GC Exh. 1(q); Tr. 8).

<sup>2</sup> BGC asserted essentially the same positions in all three of the answers it filed to the original complaint and subsequent amendments on September 14, 2017 (GC Exh. 1(g)), March 20, 2018 (GC Exh. 1(n)) and July 5, 2018 (GC Exh. 5).

<sup>3</sup> Only one witness testified: Lindsey Sherman, director of human resources for Newmark Knight Frank, which as discussed *infra* is a BGC subsidiary. BGC stipulated that Sherman is its agent (Tr. 9–10).

## I. FACTUAL BACKGROUND

BGC is a publicly traded holding company (NASDAQ) with an office and place of business in New York, New York. It does not have any statutory employees of its own, but wholly or partially owns 68 other companies with offices around the country that do. Many of these BGC subsidiaries provide financial services. Others, such as BGC Real Estate of Arizona, and Newmark Knight Frank (NKF) and other publicly traded companies in the Newmark Group, provide commercial real estate services.<sup>4</sup> BGC is also affiliated with Cantor Fitzgerald, L.P., which owns a controlling percentage of the outstanding voting shares of BGC and is affiliated with several other companies around the country that primarily provide financial services. See the similar decision issued this same day in *Cantor Fitzgerald LP*, 28–CA–195506.

The BGC employee handbook was jointly created by the human resources departments of BGC, NKF, and Cantor in 2014, and has been made available to and applied at all 68 of the BGC subsidiaries since.<sup>5</sup> It sets forth numerous rules divided into eight sections: Introduction (100), Equal Employment Opportunity (200), Ethics and Compliance Policies (300), Employment and Personnel Records (400), Work Hours & Compensation (500), Benefits and Leave (600), Security and Protection of Assets (700), and General Guidelines (800).

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<sup>4</sup> Jt. Exh. 2; Tr. 34–36, 78–79. The parties stipulated that the 68 BGC subsidiaries that employ at least one non-managerial employee are: Berkeley Point Capital, LLC; BGC Technology Markets LP; AQUA Securities LP; Lucera Financial Infrastructures, LLC; Remate (USA), Inc.; CSC Commodities UK Ltd. (NY Branch); BGCantor Market Data, LP; BGC Derivative Markets, L.P.; BGC Capital markets LP; BGC Environmental Brokerage Services, LP; Newmark & Co. Real Estate, Inc.; Newmark Real Estate of New Jersey LLC; Newmark of Connecticut LLC; Newmark of Long Island LLC; Newmark Retail LLC; Newmark of Washington D.C. LLC; Newmark Southern Region LLC; Newmark Midwest Region, LLC; Newmark of Southern California; Newmark Real Estate of Houston LLC; Newmark Real Estate of Dallas LLC; NKF Global Corporate Services; Newmark Real Estate of Massachusetts LLC; Newmark Knight Frank Valuation & Advisory LLC; Fenics FX, LLC; BGC Brokers US LP; BGC Financial LP; CRE Group, Inc.; BGC Real Estate of Nevada LLC; BGC Real Estate of Ohio LLC; Newmark S11 GP, LLC; Spring 11, LLC; G&E Real Estate, Inc.; G&E Real Estate Management Services, Inc.; BGC Real Estate of Arizona LLC; BGC Real Estate of Michigan LLC; BGC Real Estate of Washington LLC; Ross Real Estate, Ltd.; Cornish & Carey Commercial, Inc.; G&E Appraisal Services, LLC; Steffner Commercial Real Estate, LLC; Rudesill-Pera Multifamily, LLC; ARA-National Affordable Housing Group, LLC; Apartment Realty Advisors of Arizona, LLP; Apartment Realty Advisors of Georgia, Inc.; ARA-Partners/Austin, Ltd.; ARA Cal, Inc.; Apartment Realty Advisors of the Carolinas, Inc.; Apartment Realty Advisors/Central States, Inc.; Apartment Realty Advisors of Colorado, LLP; O’Boyle Properties, Inc.; Apartment Realty Advisors of Florida, Inc.; Southwest Residential Partners, Inc.; Apartment Realty Advisors Midwest, Inc.; ARA Northwest, LLC; ARA DC, LLC; ARA National Land Services, LLC; ARA Oklahoma & Arkansas, LLC; ARA-Corporate; Apartment Realty Advisors, LLC; Computerized Facility Integration, LLC; Excess Space; Walchle Investment Group, Inc.; GFINet Inc.; GFI Securities, LLC; Fenics Software Inc.; AMEREX Brokers LLC; and Sunrise Brokers LLC. (Jt. Exh. 2, Table B.)

<sup>5</sup> Tr. 36–38, 59–60; Jt. Exh. 2, par. 4.

The General Counsel challenges four of the rules: Requests for Employee Information (403), Press Inquiries and Other Information Requests (804), Cooperating in Investigations and Litigation (805), and Personal Appearance (811). The General Counsel also challenges a confidentiality statement that appears at the bottom of each page of the handbook. The General Counsel contends that each of these rules or provisions is unlawfully overbroad and coercive under the analytical framework set forth in *Boeing Co.*, 365 NLRB No. 154 (2017).

## II. JURISDICTION

As indicated above, BGC denied in its answers to both the original August 31, 2017 complaint and the March 6, 2018 amended complaint that it is an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act. In addition, it affirmatively asserted that the Board lacks jurisdiction over it because, inter alia, it has no employees.<sup>6</sup> Apparently for this reason, the General Counsel again amended the complaint at the beginning of the June 20 hearing to delete the jurisdictional allegations regarding BGC and substitute jurisdictional allegations regarding its 68 subsidiaries.

The General Counsel and BGC at that time also submitted certain related stipulations they had entered into “for the sake of efficiency.” The stipulations stated that each of the 68 subsidiaries has at least one non-managerial employee, is an employer within the meaning of the Act, and applies the handbook rules to its employees; that each of the subsidiaries waives the filing and service of the charge and the opportunity to file an answer or present evidence in defense of the complaint allegations; and that BGC “has authority to require,” and “will require” the subsidiaries “to take all necessary actions to comply with any remedial order or relief that may issue” in this case. In its July 5 posthearing answer to the June 20 amended complaint, BGC also specifically admitted that each of the subsidiaries performs services valued in excess of \$50,000 in more than one state and is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. See Jt. Exh. 2, and GC Exhs. 1(q) and 5.

The foregoing stipulations and admissions appear sufficient to establish jurisdiction over the 68 subsidiaries. However, the 68 subsidiaries are not named or alleged respondents. The General Counsel never amended the complaint to name them as respondents or allege that they violated the Act by maintaining and applying the rules and provisions. As indicated above, the amended complaint continues to allege only that BGC violated the Act by maintaining the rules or provisions and making them available to its 68 subsidiaries, which applied them to their employees.

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<sup>6</sup> As indicated in BGC’s posthearing brief (pp. 3–5), it previously asserted the same position in a similar case that was heard by another administrative law judge. The complaint there named both BGC and one of its subsidiaries. As here, BGC asserted that the Board had no jurisdiction over it. In response, the General Counsel initially argued at the hearing that BGC and the subsidiary constituted a single employer. However, the General Counsel subsequently abandoned this argument and dropped BGC from the complaint, leaving only the subsidiary as a named respondent. See *G&E Real Estate Management Services, Inc. d/b/a Newmark Grubb Knight Frank*, 28-CA-178893, JD–31–17, 2017 WL 1953655 (May 10, 2017), Tr. 9–32, cross exceptions filed June 16 and 21, 2017.

Thus, the threshold issue in this case is whether the Board has jurisdiction over BGC, i.e., whether BGC is a Section 2(2) “employer” subject to the Act’s prohibitions against interfering with, restraining, or coercing employees in the exercise of their protected rights to engage in union or concerted activities for the purpose of improving their wages, hours, or other terms and conditions of employment. As with other elements of the prima facie case, the burden is on the General Counsel to establish that BGC is such an employer. See *Laborers Local 1177 (Qualicare-Walsh, Inc.)*, 269 NLRB 746 (1984).

The General Counsel has failed to do so. Under extant Board precedent, an “employer” under the Act is one that employs statutory employees. See *Operating Engineers Local 487 Health and Welfare Trust Fund*, 308 NLRB 805 (1992) (dismissing the complaint because the General Counsel had not shown that the Fund, the only named respondent, employed any such employees). The General Counsel has never offered any reason to distinguish or disregard this precedent. Indeed, the General Counsel’s posthearing brief does not even address the jurisdictional issue.<sup>7</sup>

Arguably, BGC’s above-described stipulations—that it participated in creating the handbook and provided it to the subsidiaries; that it has the authority to require the subsidiaries to rescind the handbook rules or provisions; and that the subsidiaries waive whatever due process rights they may have in this proceeding—are sufficient to establish that BGC is an agent of the subsidiaries, at least with respect to the handbook rules or provisions. Section 2(2) of the Act states that the term “employer” may include “any person acting as an agent of an employer, directly or indirectly.” And Section 2(1) of the Act states that the term “person” may include “corporations.” However, the amended complaint does not allege, and the General Counsel has never argued, that BGC is such an agent. See *id.* at 809 n. 7 (refusing to consider any such agency theories where the General Counsel neither alleged nor argued the theories before the administrative law judge).

Further, the record as a whole indicates that BGC’s stipulations had a remedial rather than a jurisdictional purpose. That is, they were intended, not to implicitly or effectively stipulate that BGC is a 2(2) agent of its subsidiaries, but to stipulate that BGC “would require [its] affiliates to comply with any order issued” by the Board (Tr. 16); that BGC “will ensure that

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<sup>7</sup> There is also a question whether BGC satisfies the Board’s interstate commerce standards for asserting jurisdiction. As indicated above, the amended complaint alleges, and BGC admits, that the 68 subsidiaries satisfy those standards. However, the amended complaint does not allege, and the General Counsel does not argue, that BGC and each of the 68 subsidiaries are a single employer or that there is any other recognized legal basis to combine their operations for purposes of determining BGC’s interstate commerce. Nor does the amended complaint allege that BGC is independently engaged in sufficient interstate commerce. Arguably, the fact that BGC is publicly traded on the NASDAQ is sufficient. See *Real Foods Co.*, 350 NLRB 309, 318 (2007); and *Allright New York Parking, Inc.*, 180 NLRB 757, 758 (1970) (citing the company’s listing on a stock exchange as one of several factors supporting a finding that the company satisfied the Board’s commerce standards). However, again, the General Counsel does not make this argument. In any event, it is unnecessary to reach the issue given that the General Counsel has failed to establish that BGC is an employer within the meaning of the Act.

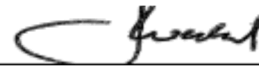
any affiliate entities where these rules are in place, that the remedy runs to those affiliates and they comply with it” (Tr. 17). Compare *UPMC*, 362 NLRB No. 191, slip op. at 1 n. 2, and 7, and JD at 26–27 (2015), which likewise involved alleged unlawful rules or policies, where the Board’s order included a provision requiring certain remedial actions, not only by the two named respondent UPMC subsidiaries, but also by UPMC itself, even though it was not a named respondent, because UPMC had executed a pretrial stipulation that it would expunge any policies found to be unlawful wherever they existed on a system-wide basis at any and all of its facilities and notify all employees at those facilities that the policies have been rescinded.

Accordingly, as the General Counsel has failed to establish jurisdiction over BGC, the amended complaint allegations against it must be dismissed.

ORDER<sup>8</sup>

The amended complaint is dismissed.

Dated, Washington, D.C., September 7, 2018



Jeffrey D. Wedekind  
Administrative Law Judge

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<sup>8</sup> If no exceptions are filed as provided by Sec. 102.46 of the Board’s Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.